No. 94-859

In The

Supreme Court of the United States

October Term, 1994

Bruce Babbitt, Secretary of the United States Department of the Interior, *et al.*,

Petitioners,

v.

Sweet Home Chapter of Communities For a Great Oregon, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICI CURIAE ON BEHALF OF THE NAVAJO NATION, JICARILLA APACHE TRIBE, SOUTHERN UTE INDIAN TRIBE, AND UTE MOUNTAIN UTE INDIAN TRIBE IN SUPPORT OF RESPONDENTS

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18 pp

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INTEREST OF THE AMICI CURIAE

Amici curiae are four Indian Tribes who are unable to secure the economic benefits of their valuable senior federal reserved water rights in the San Juan River Basin of New Mexico and Colorado because of restrictions imposed by the United States Fish & Wildlife Service (FWS) under the authority of § 7 of the Endangered

Species Act (ESA), 16 U.S.C. § 1536.[1] Because title to the four Tribes' water rights are held by the United States as trustee, any effort to economically develop these water rights triggers the complex § 7 procedures imposed on federal agencies.

The Tribes have occupied the lands adjacent to the San Juan River system from time immemorial. They embrace the goals of the ESA – to conserve endangered and threatened species. Yet, their experience with current FWS practices in the San Juan River shows that, contrary to Congress' plan, the conservation plans put in place to implement the ESA have failed to "take into consideration" the impact of federal policies on the cultural and social welfare of the Tribes.[2]

The Tribes are afraid that Congress' plan to carefully evaluate limitations imposed on private lands and waters when § 7 is invoked has been replaced with an end around criminal prohibition inserted by FWS regulation in § 9. The Tribes urge the Court to consider the failure of the FWS to protect the Tribes as private owners of habitat when assessing the reasonableness of the inclusion of

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[1] The parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

[2] ESA policies in the San Juan have not only adversely affected the Tribes' cultures and way of life, but also the conservation plans have effectively repealed efforts by Congress to assist the four Tribes to economically develop their senior water rights. *See,* Jicarilla Apache Tribe Water Right Settlement Act, Public Law 102-441; Colorado Ute Water Rights Settlement Agreement, Public Law 100-585; Navajo Indian Irrigation Project, Public Law 87-483.

"habitat modification" in the definition of harm in the case at hand.

SUMMARY OF ARGUMENT

The Tribes file this brief amici to bring to the attention of the Court the dangers to Tribal societies when the ESA is administered, as it has been in the San Juan Basin, not in conformity with Congress' specific statutory habitat protections. Reservation lands and waters have been exposed to what the Tribes believe is an unreasonable implementation of the ESA by the FWS. Specifically, the Secretary has targeted Reservation habitat without providing the Tribes with the protections inserted by Congress in § 7 while at the same time exposing Tribal members under § 9 to the risk of serious federal punishment.

The Tribes' concern the ESA implementation not impair their way of life is also directly implicated by 50 C.F.R. § 17.3 – the regulation at issue in this litigation. The Tribes as governments are responsible for protection of their Reservation lands and waters. If portions of their Reservations have habitat which is essential to the protection of threatened or endangered species, the Tribes and their members are subject to potential criminal prosecution when managing their Reservation lands and waters as they have since time immemorial. The Tribes seek protection from the Court through a decision confirming that criminal penalties should not be imposed on Tribal members who inadvertently kill or injure endangered or

threatened species while engaging in traditional Reservation land and water management activities.

ARGUMENT

A. FWS' Treatment of the Definition of "Harm" is Not Reasonable – On One Hand FWS Ignores Congress' Habitat Plan Under § 7 and On the Other Hand It Rewrites Congress' Habitat Concepts Under § 9.

The amici curiae four Indian Tribes of the San Juan Basin urge the Court to find that FWS' inclusion of "habitat modification" in the definition of "harm" inserted into § 9 of the ESA is unreasonable.

FWS has fundamentally rewritten Congress' plan to have the listing of threatened or endangered species based solely on biological information, while at the same time assuring that the impact of such listing on the resources of private citizens is thoughtfully examined. In the San Juan Basin, conservation biology dictates not only the listing process but also drives the restrictions imposed on private lands and waters as a result of species listing. While the former is in line with Congress' plan, the latter is not.

FWS has accomplished this restructuring of the ESA by: 1) selectively adding regulatory enforcement features not included by Congress in the ESA; and 2) ignoring Congress' mandate to protect private habitat of greatest value to its owners. We next describe how FWS has accomplished this rewriting of the ESA.

Step One: Under 16 U.S.C. § 1533 the Secretary is to first determine whether any species is endangered or threatened. In making that determination, the Secretary is permitted to examine a variety of natural or man-made factors including inadequacy of existing regulatory mechanisms, disease, over utilization for commercial recreation, scientific or educational purposes, or a threatened destruction, modification or curtailment of habitat.[3]

Step Two: 16 U.S.C. § 1533(a)(3) provides that concurrently with making the determination described above, the Secretary shall designate any habitat of such species which is then considered to be critical. Critical habitat is defined in 16 U.S.C. § 1532(5) as habitat essential to the conservation of the species and which may require special management considerations or protections. In determining critical habitat, the Secretary is instructed to use not only the best scientific data available, but also shall "take into consideration" the economic impact and any other relevant impact of specifying any particular area as critical habitat. 16 U.S.C. § 1533(a)(3). Moreover, the Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . . " *Id.*

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[3] The brief amici curiae of the *National Wildlife Federation, et al.*, erroneously informs the Court, p. 3, fn. 2, that when listing the Secretary "must consider" potential impacts on habitat. To the contrary, 16 U.S.C. § 1533, expressly provides the Secretary with a variety of non-habitat factors which he may rely upon to support a listing.

Step Three: Once a species has been listed as endangered or threatened and once habitat has been designated as critical, then limitations are imposed under § 9 (the takings provision) and under § 7 (the consultation provision). Under § 7, each federal agency shall ensure that its actions are not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat which is determined to be critical. 16 U.S.C. § 1536(a).

Congress did not define what it means to jeopardize the continued existence of any endangered species or define what is destruction or adverse modification of critical habitat. As a result, the Secretary in 50 C.F.R. § 402.02 defined "jeopardizing the continued existence" to mean:

> To engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

The Secretary also defined "destruction or adverse modification" to mean:

> A direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

Id.

Under § 9, 16 U.S.C. § 1538, additional protections for endangered species are established through the imposition of criminal penalties. Congress made it unlawful for any person to "take any such listed species within the United States." Congress at 16 U.S.C. § 1532(19) defined "take" to mean:

> To harass, harm, pursue, hunt, shoot, wound, kill, trap, or capture or collect, or to attempt to engage in any such conduct.

Whereas under § 7 the Secretary elected by executive regulation to define "jeopardize the continuing existence of" and "destruction or adverse modification" because Congress had failed to do so, under § 9 the Secretary added a new concept – this time not to fill a missing term but rather to impose an executive gloss on what is a complete congressional definition of "take." The Secretary's regulatory gloss – at issue in this litigation – states:

> Harm in the definition of "take" in the act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

The Secretary, acting through FWS, has implemented this habitat scheme in a way which takes away Congress' protections for private habitat under § 7 while at the same time exposing the owners of private habitat to serious federal punishment under § 9. First, FWS has failed to designate a critical habitat "concurrently" with listing as is required by Congress, 16 U.S.C. § 1533(a)(3).

See, Jim Saltzman, "Evolution and Application of Critical Habitat Under the Endangered Species Act," 14 Harvard Environmental Law Review, 311 (1990).

Second, FWS has failed to adhere to Congress' careful plan to protect private lands and waters when developing federal policies to protect endangered or threatened species. Specifically, Congress required in two places that FWS mitigate the impact of its listing on private lands and waters. Under 16 U.S.C. § 1533(b)(2), when designating habitat which is critical to the conservation of a species, the Secretary is to "take into consideration" the economic impact and any other relevant impact.[4] To take into consideration is defined to take into account, to exercise a "thoughtful and sympathetic" regard for the impacts on private parties. See definition of "consideration" in *Webster's New Collegiate Dictionary* (G. & C. Merriam Company, 150 Anniversary Edition 1981). Moreover, when taking steps to assure that federal agencies do not take actions which are likely to jeopardize the continued existence of any endangered species or the destruction or the adverse modification of critical habitat, the Secretary is again required to utilize "consultation" – this time with the affected states – so that state and private interests are again evaluated when conservation measures are fixed. 16 U.S.C. § 1536(a). Consultation includes deliberation and deliberation is defined as "resulting

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[4] Congress intended ESA implementation to balance biologically defined conservation measures with real life impacts. That is, in the administration of the ESA, FWS is to consider the "economics and any other relevant impacts" and "factors of recognized or potential importance to human activities." H. R. Rep. No. 1625, 95th Cong., 2d Sess. (1978), p. 17.

from careful and thorough consideration." See definition of "deliberation" in *Webster's New Collegiate Dictionary* (G. & C. Merriam Company, 150 Anniversary Edition 1981).

When habitat essential to species preservation is designated concurrently with listing and involves thoughtful and sympathetic consultation, both FWS and private citizens can implement Congress' § 7 plan to protect special habitat. Such consultation can also alert citizens to their non-habitat duty under § 9 – namely to avoid direct injury to a listed species. The Tribes have found little interest on the part of FWS to either minimize the impacts of § 7 actions on Reservation lands and waters or to narrow Tribal member exposure to § 9 criminal liability.

B. In the San Juan Basin FWS Has Adversely Affected the Tribes' Reservation Lands and Waters and Has Improperly Exposed the Tribes and their Members to Criminal Penalty.

FWS asks this Court to uphold its regulatory definition of harm as "reasonable in light of the legislature's revealed design," *Nations Bank v. Variable Annuity Life Ins. Co.*, No. 93-1612 (Jan. 18, 1995), slip op. 5. In rendering its decision, it is important for the Court to understand in real life terms the scope of Congress' plan and what has been FWS' implementation. When viewed in that light, the inclusion of "habitat modification" in the definition of "harm" is not reasonable.

A prime example of how FWS treats habitat issues can be seen from the Tribes' experience in the San Juan Basin. Sixteen years ago, in 1979, FWS advised three of the four Tribes that development of their senior water

rights would not threaten or endanger the Colorado squawfish or razorback sucker. *See*, December 28, 1979 § 7 consultation on the Animas LaPlata water storage project. Twelve years later, in 1991, FWS issued revised consultations which concluded, contrary to its 1979 opinion, that, in fact, the effort of the Tribes to develop their water resources would likely jeopardize two endangered or threatened fish species. *See*, October 25, 1991 consultation on the Animas LaPlata and October 28, 1991 biological opinion on the Navajo Indian Irrigation Project.[5]

In the twelve years between 1979 and 1981, FWS made no effort whatever to sit down with the Tribes and designate critical habitat on the Tribes' Reservations in a way which would minimize harm to the Tribes and their

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[5] The FWS revisited consultation – reversing its twelve year record of no jeopardy – occurred literally days before the Animas LaPlata Project – originally authorized in Congress in 1968 – was to begin construction. FWS' endangered species timing in the San Juan Basin is reminiscent of Senator Garn's observations in 1978 that in its actions under § 7, FWS appeared less interested in protecting an endangered specie – the one at issue in 1978 was the furbished louse wart – than on a desire to stop a water project, in 1978 the water project was the Dickey Lincoln Project. *See* Hearings on S. 2899 before the Subcommittee on Resource Protection, the Senate Committee on Environmental and Public Works, 95th Cong., 2nd Sess. (1978), p. 45. Also, the Court should understand that one of the listed species – the Colorado squawfish is a predator which a generation ago federal and state wildlife officials attempted through poisoning to eradicate from the San Juan Rivers and the second of the listed species – the razorback sucker has only had one of its specie seen in the San Juan system in the last 29 years and that sighting occurred in Utah miles away from the Colorado/New Mexico Reservation lands occupied by the Tribes.

members.[6] To the contrary, the Secretary failed to consistently follow his own regulatory scheme and made ad hoc findings of "jeopardy." Thus, with respect to proposed water development in Colorado, the Secretary concluded that the actions of the Tribes would "appreciably reduce the likelihood of both the survival and recovery of the species in the wild by further reducing its numbers, reproduction, and distribution." October 25, 1991 FWS Opinion. At the same time, when limiting Indian depletions in New Mexico, FWS made no reference to a pending reduction in species numbers, reproduction, and distribution, but rather concluded that the Indians economic development efforts would increase "concentrations of contaminants in its habitat." October 28, 1991 FWS Opinion.

These FWS' findings of jeopardy show FWS arbitrarily mixing species designation with habitat considerations. Obviously, they provide the Tribes with very little guidance as to what Reservation lands and waters the federal government considered to be critical. Indeed, in

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[6] Consulting with the Tribes to minimize ESA impacts is not only required by Congress in the designation of critical habitat provisions of 16 U.S.C. § 1536, but also it is essential to preserving the longstanding trust relationship between the United States and the Tribes. FWS as a federal agency is "duty-bound to exercise great care in administering" its trust. *United States v. Mason*, 412 U.S. 391, 398 (1972). Moreover, when the exercise of this trust duty occurs simultaneously with FWS' habitat selection duties under ESA, it "must choose the alternative that is in the best interest of the tribes." *See Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), *modified*, 782 F.2d 855 (1984) (en banc) (adopting dissenting opinions).

its 1991 opinions FWS gave no attention whatsoever to critical habitat or to the prospects of the Tribes and their members becoming subject to criminal penalty under§ 9.[7] Rather, FWS utilized its 1991 jeopardy opinions to extract from the Tribes a reluctant commitment in a "reasonable and prudent alternative" to jeopardy to forego for an indefinite period the use of a portion of their senior water rights so as to permit FWS to engage in research to test fish behavior with differing river flows.

Finally, when the FWS three years later designated critical habitat for the Colorado squawfish and razorback sucker, FWS failed to specifically consider the impact of its designation on the Tribes on the Reservations and on the Tribes' culture and society. Rather, FWS concluded on the basis of a six State mathematical model that whatever theoretical adverse economic impacts might occur in Colorado, New Mexico and Utah, they would likely be made up by additional water for use in Arizona, Nevada and California. FWS Critical habitat designation, 59 Fed. Reg. 13,384 (1994).

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[7] The 1991 biological opinions included incidental take statements developed under the authority of 16 U.S.C. §§ 1536(b)(4)and 1536(o) exempting agency actions from the ban on takings in § 9. However, the exemption on its face covers partial construction and partial operation of federal projects to deliver a portion of the Tribes' federal reserved water rights. There is nothing in the incidental take exemption which purports to protect the Tribes and their members from criminal penalty were their members to engage in significant habitat modification causing injury to the Colorado squawfish or razorback sucker.

The Tribes believe that had FWS honored Congress' plan to consider in a deliberate and sympathetic way the impact of threatened or endangered listing on the private lands and waters of the Tribes' Reservations, the Tribes would not have been coerced into contributing their water rights to FWS biology research under § 7. Nor would the Tribes and their members have become subject to criminal penalty through what they believe is an unsupportable regulatory redefinition of "take" in violation of *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).

CONCLUSION

Like the Colorado squawfish and razorback sucker, the Tribes have been adversely affected by the spread of civilization to the American West. They, like endangered or threatened species, rely upon Congress for protection. In its zeal to do all that it can for threatened or endangered species, FWS has ignored the delicate balance which Congress has imposed on federal efforts to protect the species. In its zeal FWS has both deprived Reservation lands and waters of § 7 habitat protections and improperly exposed Tribal members to § 9 habitat penalties.

The Tribes request the Court to rule unlawful FWS' expansion of the criminal take penalties under the ESA for it embraces traditional actions taken by the Tribes and

their members in the management of their Reservation lands and waters.

Dated: March 1995

Respectfully submitted,

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